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IN THE

Supreme Court of the United States

No. 867

OCTOBER TERM, 1946

FLORENCE MARIE TOWNSEND, *NEE* BARNETT; RINA URQUHART, *NEE* RICHARD; WANDA CURTIS, *NEE* RICHARD; GEORGE STIDHAM, GUARDIAN OF EASTMAN RICHARD, JR., an incompetent; LEONA FOX, *NEE* RICHARD; and GEORGE BARNETT, JR., a minor, by GEORGE BARNETT, SR., Guardian, *Petitioners*,

VERSUS

FIRST NATIONAL BANK AND TRUST COMPANY, a Banking Corporation of Muskogee, Oklahoma; and H. H. OGDEN, *Respondents*.

ANSWER AND BRIEF OF RESPONDENTS

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vs.

FIRST NATIONAL BANK AND TRUST COMPANY, a Banking Corporation of Muskogee, Oklahoma; and H. H. OGDEN, *Respondents.*

ANSWER AND BRIEF OF RESPONDENTS.

The "Summary Statement of Matter Involved" tends to mislead (pages 1 to 3 of Petition).

It is there said:

> "This statute, as construed by this Court in *Parker* v. *Richard,* 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954, together with appropriate administrative regulations made thereunder and construction of the statute and regulations by the Circuit Court in *United States* v. *Watashe* (C. C. A. 10th), 102 Fed. (2d) 428, require that the Secretary of the Interior approve the removal of restrictions on alienation.
>
> "The Circuit Court below in the judgment here questioned has held that the approval of the Superintendent of the Five Civilized Tribes is sufficient to effect removal of such restrictions."

As to funds derived from leases of "restricted lands" made with the approval of the Secretary of the Interior, *Parker* v. *Richard, supra,* merely held, "in the absence of some provision to the contrary, the supervision *naturally* falls to the Secretary of the Interior," and, in such situation, "the authority of the Secretary of the Interior to *supervise* the * * * disbursements of the royalty has not terminated."

U. S. v. *Watashe, supra,* involved only the necessity for the approval of a deed, to real estate, containing a restrictive habendum clause, where such real estate had been purchased with restricted funds.

In neither case was there anything said that would justify the conclusion that only the Secretary, himself, could remove restrictions. On the contrary, both cases hold that restricted funds shall be disbursed under the *supervision* of the Secretary of the Interior.

The statement that the Circuit Court held, "That the approval of the Superintendent of the Five Civilized Tribes is sufficient to effect removal of such restrictions," is misleading, since the restrictions to which reference is made were restrictions on land and not on money.

It is further stated (page 3 of Petition) "After the bond was spent respondents failed to return the funds to governmental custody." The record shows conclusively that the funds in question were paid to Eastman Richard by check issued and payable to him (R. 23); that the check was endorsed by him and paid to the respondent Bank; that when the liability ceased on the bond the funds were repaid by the Bank to Eastman Richard (44 and 79), more than twenty years ago. Whether Eastman Richard returned the funds to the governmental custody is not shown, but the record does show that at the time the government did have custody of large sums of money belonging to him.

And, in the "Statement Disclosing Basis of Jurisdiction to Review" (page 5 of Petition) it is said, "Since this case raises the question whether removal of restrictions against alienation of Indian lands imposed by the Act of Congress of May 27, 1908 * * * may be effected, etc. * * * " This statement is not accurate. The instant case has nothing to do with the removal of restrictions against *alienation of Indian lands.* Only money is involved.

And, further in the same connection (page 5 of the Petition) it is said: "The Circuit Court's decision * * * gives to a relatively minor civil service official power and authority to deal with funds, the security of which Congress has vouchsafed *only* to the Secretary of the Interior." At the time here in question Congress had not vouchsafed authority to any particular official. *Parker* v. *Richard, supra* (decided June 2, 1919), had just been handed down and that case was the first expression of law extending restrictions to money, and all that it held was that "the *supervision naturally falls* to the Secretary of the Interior."

The funds in question were disbursed to Eastman Richard March 6, 1920 (R. 23), and the laws and regulations must be construed as of that date.

Petitioner assigns "Reasons Relied on for Allowance of the Writ." (page 7 of Petition).

The first sentence assumes that the Circuit Court below decided that the Superintendent of the Five Civilized Tribes has *"unlimited"* discretionary power to disburse restricted funds. This is incorrect. On the contrary, a reference to the opinion of the Circuit Court below (R. 91-95) will disclose that the court expressly distinguished the present case from that of *House* v. *U. S.*, 144 F. (2d) 555.

In sub-division (a) of this section of the Petition (page 7 of the Petition) it is stated:

"(a) rendered a decision probably in conflict with applicable decisions of this Court in *Parker* v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954, and *Sunderland* v. *United States*, 266 U. S. 226, 45 Sup. Ct. 64, 69 L. ed. 259."

There is no conflict, nor are the cited cases probably in conflict with applicable decisions of this Court.

Parker v. *Richard, supra,* as heretofore indicated, merely held that funds derived from the sale of restricted lands, while in the hands of the government, were restricted.

Sunderland v. *United States, supra,* involved only title to *real estate.*

In sub-division (b) of this section of the Petition, it is said that the decision is squarely in conflict with a prior decision of this same Circuit, in *United States* v. *Watashe*, 102 F. (2d) 428. That case involved only the authority of the assistant superintendent of the Five Civilized Tribes to approve a deed executed by a Creek Indian. The decision in the instant case is in harmony therewith. There is no conflict as is contemplated by Rule 5 (b) of this Court.

Sub-division (c) is set forth as an additional reason for the allowance of the writ. It states that the Circuit Court below "rendered a decision probably in conflict with a decision of the Eighth Circuit Court of Appeals" and then cites *United States* v. *Brown*, 8 F. (2d) 564.

United States v. *Brown, supra,* does not, in any manner, conflict with the decision of the Circuit Court in this case. As a matter of fact, it is in full harmony with this decision. There, the disbursement of the funds in question was authorized by the County Court (the Indian being a minor) and was made by the *Superintendent of the Five Civilized Tribes* (see 8 F. (2d) 568). In any event, the decision did not purport to do more than to determine the validity of restrictions

on lands purchased with restricted funds, and with the conditions as to the disposal thereof. It involved only the validity of the conditions inserted in what is generally known as a "Carney Latcher" deed.

The final statement in the Petition (page 8 of the Petition) refers to the historic policy of Congress to protect Indians as against the greed of others and their own improvidence.

Obviously "the greed of others" is not here involved, as the Bank repaid the entire amount to Eastman Richard (R. 44 and 79).

Apparently "improvidence" was not being considered by the Department, as the record indicates (R. 36-37) large items of disbursements paid to Eastman Richard subsequent to the disbursement here in question. In other words, Eastman Richard had a large amount of money at all times here in question.

It is to be noted that the government, while it conducted the entire trial in the District Court (R. 15 and 63) did not see fit to prosecute its appeal in this case.

ARGUMENT.

We refer to the argument of Petitioner (page 10 of the Petition). It is there said:

> "Where Congress has required discretionary approval of the Secretary to remove restrictions, approval of the Superintendent is not enough."

At the time the disbursement here in question, was made, March 6, 1920 (R. 67), there was no act of Congress expressly requiring or directing approval of the disbursement of funds belonging to the individual Indians. *Parker* v. *Richard* was decided June 2, 1919, and this merely held

that the supervision naturally fell to the Secretary of the Interior. It is to be noted that the word "supervision" is the one used. As was said in *American National Bank* v. *American Baptist Home Mission Society* (C. C. A. 2) 106 F. (2d) 192: "It is incredible that the Secretary of the Interior should have been required, by his own regulation, to authorize all the various payments for food, supplies and equipment needed by every Indian, through personal orders of himself or an assistant secretary." Petitioner cites nothing to the contrary.

Again (page 13 of the Petition), it is said:

> "The appropriate regulations of the Secretary have not delegated unlimited power of approval to the Superintendent in removing restrictions."

In the Second Circuit, the case of *American National Bank* v. *American Baptist Home Mission Society, supra,* expressly held that the Superintendent *did* have the authority to authorize disbursement of funds to the individual Indian, or to others in his behalf. In that case the regulations appear on the margin of the opinion. The same regulations apply to the instant case.

In the opinion of the court below, in this case (8th Circuit, R. 91, *et seq.),* the court considered the same regulations. Both Circuits agree.

In another case in the Eighth Circuit, *Landman* v. *Commissioner of Internal Revenue,* 123 F. (2d) 787, the same doctrine is approved.

But, it is argued (page 14 of Petition) that the section of the regulations in question continues with a proviso, and the proviso referred to is printed in full on pages 14 and 15 of the Petition. Petitioner then continues with an argument, resting the same on this proviso. In this connection,

attention is called to the fact that the regulation in question does not appear in the record in this cause.

However, if this Court will take judicial notice of these regulations, it will find that the proviso, to which Petitioner refers, and on which he bases his argument, was not a part of the regulations on the date of the transaction in question. The proviso mentioned by Petitioner was an amendment of Section 24 of the Regulations, approved by the Secretary of the Interior October 7, 1922. Consequently, it has no application to this case.

The opinion of the Circuit Court for the Tenth Circuit, in this case, delivered by Honorable Orie L. PHILLIPS, Circuit Judge, is, as a matter of fact, a complete answer to the argument of the Petitioner, herein.

It is respectfully submitted that the Petition should be denied.

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